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Supreme Court, U.S.
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No. 96-5955

In The

Supreme Court of the United States

October Term, 1996

STEINEY J. RICHARDS,

Petitioner,

v.

THE STATE OF WISCONSIN,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of Wisconsin

PETITIONER'S BRIEF

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QUESTIONS PRESENTED FOR REVIEW

I. Does the Fourth Amendment, as interpreted by *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), permit a court to uphold police noncompliance with the rule of announcement without looking to the particular circumstances of the entry if the police have a warrant to search for drugs?

II. Does the Fourth Amendment, as interpreted by *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), permit a blanket exception to "knock-and-announce" if drugs are the object of a search warrant?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CITATIONS OF OPINION BELOW

The March 3, 1994 opinion of the Wisconsin Court of Appeals in the direct appeal is unreported. (J.A. 73-75) It is listed in the table at 183 Wis. 2d 429, 516 N.W.2d 19 (1994).

The petition for review was granted by the Wisconsin Supreme Court, the state's highest court, and its opinion affirming the judgment was rendered June 12, 1996. *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996). (J.A. 76-109)

BASIS FOR JURISDICTION

The jurisdiction of this court lies under 28 U.S.C. § 1257(a). The judgment of the Wisconsin Supreme Court was entered June 12, 1996. The petition was filed September 10, 1996, and it was granted January 3, 1997.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution reads as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the U.S. Constitution provides in § 1 that:

> . . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law,. . . .

STATUTES INVOLVED

Wis. Stats. § 968.14 (1989-90):

Use of force

> All necessary force may be used to execute a search warrant or to effect any entry into any building or property or part thereof to execute a search warrant.

Other statutes on Wisconsin search warrants involved appear in Appendix A. They are:

(a) Searches and seizures, when authorized; Wis. Stats. § 968.10 (1989-90);

(b) Search warrant provisions; Wis. Stats. § 968.12 (1989-90);

(c) Property subject to seizure under search warrants; Wis. Stats. § 968.13 (1989-90); and

(d) Effect of technical irregularities; Wis. Stats. § 968.22 (1989-90).

STATEMENT OF THE CASE

A. Introduction

The case involves Wisconsin's drug case blanket exception to the Fourth Amendment's knock-and-announce requirement of *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995).

Prior to *Wilson*, the Wisconsin Supreme Court held in *State v. Stevens*, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S.Ct. 2245 (1995),[1] that the nature of the "drug culture" permitted Wisconsin police to dispense with the knock-and-announce requirement in drug cases. *Id.* at 425, 511 N.W.2d at 596. The Wisconsin court stated, in summary, *id.* at 424-25, 511 N.W.2d at 595:

> We hold that when the police have a search warrant, supported by probable cause, to search a residence for evidence of delivery of drugs or evidence of possession with intent to deliver drugs (evidence of drug dealing), they necessarily have reasonable cause to believe exigent circumstances exist. Thus, in all such searches the police are justified in dispensing with the rule of announcement and making a no-knock entry. (footnote omitted)

Richards' appeal arrived first at the Wisconsin Court of Appeals where his conviction was affirmed based on *Stevens*. (J.A. 73-75) This decision is unreported and appears in the table at 183 Wis. 2d 429, 516 N.W.2d 19 (1994).

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[1] *Stevens* was pending before this Court for several months, and the Court denied certiorari eight days after *Wilson* was decided.

Petitioner requested review in the Wisconsin Supreme Court to determine whether *Wilson* affected its ruling in *Stevens*. The Wisconsin Supreme Court granted review and affirmed June 12, 1996, finding that the knock-and-announce exception for evidence of drug dealing was constitutional under *Wilson*. *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996). (J.A. 76-109)

B. Facts

This case arises from a drug raid on Room 138 of the Ramada Inn in Madison, Wisconsin at 3:40 a.m.,[2] December 31, 1991. The officers did not knock-and-announce in making their entry.

According to the warrant application (J.A. 2-8), during the week of December 22, 1991, Officer Richard Pharo of the Dane County, Wisconsin Metro Narcotics Unit,[3] learned from a citizen informant that at least four black male drug dealers from Detroit were staying at Motel 6 on Thierer Road in Madison. (*Id.* 4). The informant described one as being in his twenties, approximately 5'9" and well over 200 pounds. (*Id.* 5) Officer Bill Murphy and the management at Motel 6 confirmed that four black males were staying in at least two different rooms at Motel 6. These men frequently refused maid service, paid cash for their rooms, and made and received numerous

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[2] Wisconsin law permits a search warrant to be served at any time of day or night without specific authorization required for nighttime service. *See State v. Seyferth*, 134 Wis. 2d 354, 397 N.W.2d 666 (Ct.App.1986). *See* Fed.R.Crim.P. 41(c)(1).

[3] The drug unit actually has a longer name, but this is what Pharo called it in the affidavit for the search warrant. (J.A. 3)

phone calls. (*Id.*) In Pharo's experience, these activities were consistent with drug dealing. (*Id.*)

On December 28, 1991, Officer Murphy learned the four men had checked out of their rooms at Motel 6. (*Id.* 6) He removed from one of their abandoned rooms a box of clear sandwich baggies. (*Id.*)

Detective Pharo learned that Steiney Richards was the name of one of the men registered at Motel 6. (*Id.*) Richards' address was listed by the motel as 11415 Sorrello, Detroit, Michigan. (*Id.*) Murphy contacted the Detroit Police Department and learned that a 5'9" 280 pound black male named Steiney Richards living at 11415 Sorrento had been arrested in January 1991 in possession of 63 packets of cocaine. (*Id.*)

Detective Pharo went to the Ramada Inn and learned that Richards had checked into Room 138 in the early morning hours of December 28, 1991, paying cash in advance for the rent through January 4, 1992. (*Id.* 7) Richards gave an address this time of Laro 11415, Detroit. The management informed Detective Pharo that Richards had made at least 51 outgoing calls from the room. (*Id.*)

Pharo prepared an affidavit and search warrant for Richards' hotel room based on all this as his probable cause. Pharo went to a judge to get his warrant signed. The judge specifically determined that the circumstances presented in the affidavit did not justify a "no-knock" warrant, so he struck the paragraph of the affidavit

requesting it and the clause of the warrant which would have authorized it.[4] (*Id.* 7, 9, 42)

Pharo gathered other officers and went to Room 138 of the Ramada Inn. Pharo was dressed in a Ramada Inn maintenance man's shirt in a ruse to get in the room without use of force. (*Id.* 27, 40) With him was an officer in "full military uniform" (*id.* 38), two or three in uniform (*id.* 39), and two plainclothes officers. (*Id.*) Some others were to hide in the room across the hall. (*Id.*)

The raid party came to the door and knocked. (*Id.* 38) Standing three or four feet to Pharo's right was the officer in "full military uniform" and to his left the uniformed officers. (*Id.* 39) The peephole was covered. (*Id.* 46)

Richards asked "Who is it?", and Pharo said "Maintenance man." Apparently not understanding, Richards asked, "Who?", and Pharo said again "Maintenance man." (*Id.* 42, 46) Richards unlocked and opened the still-chained door about an inch or an inch and one-half and peeked out. (*Id.* 43) His field of vision permitted him to see Pharo and the officer in the military uniform. (*Id.* 38-39) When Richards felt the door being pushed in, he shut and locked it. (*Id.*)

Pharo testified that Richards had a look of surprise,[5] which indicated to Pharo that Richards must have seen

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[4] Wis. Stats. § 968.12 (1989-90) neither specifically authorizes nor prohibits no-knock warrants. No-knock warrants issued by Wisconsin state judges are valid. *United States v. Singer*, 943 F.2d 758, 759 n. 1 (7th Cir. 1991).

[5] Who would not be "surprised" to encounter unexpected visitors in janitor and combat garb at the door at 3:40 a.m.?

the officer in the military uniform. (*Id.* 38, 40) Pharo said as he reached for the doorknob, Richards shut the door and locked it.[6] (*Id.* 39, 41) After a wait of about "two or three seconds," officers announced "police officers" and began to kick the door down, but it did not give way easily.[7] (*Id.* 39-41) Finally, the door gave way when an officer rammed it with his shoulder (*Id.* 39). As the door was opening, Pharo heard glass breaking. (*Id.*)

Pharo testified that during the break-in, officers said they were police officers maybe twice. (*Id.* 39-40)[8] Richards testified that he heard no one say anything about being a police officer until he was outside the window and an officer yelled "Police, freeze!" which he did. (*Id.* at 47)

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[6] Merely shutting the door does not prove that Richards knew what the people outside his door wanted. *See Miller v. United States*, 357 U.S. 301, 310 (1958):

> But, first, the fact that petitioner attempted to close the door did not of itself prove that he knew their purpose to arrest him. It was an ambiguous act. It could have been merely the expected reaction of any citizen having this experience at that hour of the morning, particularly since it does not appear that the officers were in uniform. . . . and the answer "Police" was spoken "in a low voice" and might not have been heard by the petitioner so far as the officers could tell.

[7] Anyone who has stayed in a hotel or motel in the last thirty years knows that they have heavy wooden fire resistant doors in metal frames. They will not easily give way.

[8] At the supplemental hearing on October 12, 1992, Pharo added that an officer said "Police; search warrant," simultaneously with the bang of the door crashing open. (J.A. 64-66).

During the search of Room 138, officers found hidden over the bathroom ceiling tile two plastic bags. One contained $3,000 in cash, and the other contained cocaine base, including about 120 small packets of rock cocaine. (*Id.* 20-21) Nothing was in plain view.

C. The Proceedings in the Trial Court

On February 4, 1992, petitioner was charged with drug offenses: one count of possession of cocaine with intent to deliver in violation of Wis. Stats. § 161.41(1m)(cm)4 and one count of possession of cocaine without a tax stamp in violation of Wis. Stats. §§ 139.88 & 139.95(2). (*Id.* 33)

Petitioner moved to suppress the search on the ground that the officers failed to knock-and-announce. (*Id.* 35-36) On September 9, 1992, the trial court held a suppression hearing, after which the court denied the motion, finding that the officers had cause to suspend announcement. (*Id.* 55) The trial court found that the issue turned on the circumstances confronted by the officers at the time of execution of the warrant, and what the officers could reasonably believe under the circumstances. (*Id.* 54) Further, the trial judge found that the fact that Richards had "bailed out the window" would "lead someone of a suspicious nature to beleive [sic] that maybe he did not want Detective Pharo, the maintenance man, to come in because he was aware that accompanying Detective Pharo, even if he was the maintenance man, was a uniformed officer." (*Id.*) The trial court found that the officers properly identified themselves upon the failure of the ruse to gain peaceable entry, "albeit that the

identification and the forced entry were close to each other." (*Id.* 55) Since this was a warrant to search for drugs, easily flushed down the toilet, the trial court found that the officers conducting the search were justified in not waiting longer following the identification of themselves as police officers before knocking in the door. (*Id.*) The police announced their identity before crossing the threshold. (*Id.*) There was at least some opportunity for Richards to open the door, but he "was too busy being in the corner and then out the window." (*Id.*). In conclusion, the court declared the officers' conduct reasonable and the search legal. (*Id.* 55-56)

The prosecutor filed a motion to supplement the record on October 5, 1992, on the ground the record was incomplete because the officers allegedly did announce that they had a search warrant. (*Id.* 57) On October 12, 1992, the court adduced further testimony from Detective Pharo, who testified that somebody said "search warrant." (*Id.* 64) On cross-examination, he admitted the announcement was simultaneous with the breaking. (*Id.* 66) The trial court stated that the additional testimony did not change the ultimate conclusion. (*Id.* 69)

Immediately thereafter, petitioner then pled no contest in a negotiated and conditional guilty plea[9] to thirteen years imprisonment; thirteen years on the drug charge and three years concurrent on the tax stamp[10] charge. (*Id.* 71)

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[9] Conditional pleas are permitted in Wisconsin. Wis. Stats. § 971.31(10).

[10] The Wisconsin Supreme Court ruled last month that the tax stamp statute is unconstitutional on self-incrimination grounds in *State v. Hall*, 1997 WL 24508 (Wis. Jan. 8, 1997).

D. The Decision Being Reviewed

Petitioner appealed to the Wisconsin Court of Appeals contending that the search of his room was unconstitutional under *State v. Stevens*, 173 Wis. 2d 290, 496 N.W.2d 201 (Ct.App.1992). (J.A. 73) While his case was pending, however, on February 4, 1994, the Wisconsin Supreme Court reversed the part of the appellate court opinion in *Stevens* he was relying on. *State v. Stevens*, 181 Wis. 2d 410, 511 N.W.2d 591 (1994), *cert. denied*, 115 S.Ct. 2245 (1995). So, on March 3, 1994, the Court of Appeals affirmed Richards' conviction relying on the " 'blanket rule' " of *Stevens* dispensing with knock-and-announce under a "'drug house' exception." (J.A. 73, 74) (The decision was not published. It appears in the table at 183 Wis. 2d 429, 516 N.W.2d 19 (1994).)

Petitioner sought review in the Wisconsin Supreme Court to consider whether the "blanket rule" of *Stevens* was constitutional under *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995). That court granted review, but reaffirmed *Stevens* under *Wilson* and held that today's "drug culture" and the risks to police associated with executing search warrants permitted it to find that such a blanket rule was constitutional under *Wilson*. *State v. Richards*, 201 Wis. 2d 839, 549 N.W.2d 218 (1996). (J.A. 76-109)

Unlike the trial court, the Wisconsin Supreme Court held that there had been no legal announcement, summarizing the facts thusly, 201 Wis. 2d at 843, 549 N.W.2d at 220 (J.A. 78-79):

> The dispositive facts for purposes of this appeal can be stated succinctly: on December 31, 1991, police executed a search warrant for the

> motel room of the defendant seeking evidence of the felonious crime of Possession with Intent to Deliver a Controlled Substance in violation of Wis. Stat. § 161.41(1m) (1991-92). They did not knock and announce prior to their entry. Drugs were seized.
>
> The circuit court denied Richards' motion to suppress. Richards subsequently entered pleas of no contest to the felony of possession of cocaine base with the intent to deliver, Wis. Stat. § 161.41(1m), and a tax stamp violation, Wis. Stat. § 139.95(2). The court found him guilty and sentenced him to 13 years imprisonment on the possession with intent count and three years concurrent imprisonment on the tax stamp count. Richards appealed. The court of appeals upheld the circuit court's ruling, relying on *Stevens*. Richards filed a petition for review which we granted.

Further, *id.* at 844, 511 N.W.2d at 220 (J.A. 79-80):

> Richards summarizes the issue in one sentence: "The blanket 'drug house' exception to the 'knock-and-announce' rule violates the Fourth Amendment's reasonableness requirement." Richards contends that the U.S. Supreme Court decision in *Wilson* forbids blanket rules regarding search and seizure because the reasonableness of each search must be examined on a case-by-case basis. The State . . . argues that *Wilson* does not forbid blanket rules and, under *Wilson*, the blanket rule announced in *Stevens* in still valid. We agree with the State.

The court found that there is a risk of violence anytime officers serve search warrants in felony drug delivery cases, and this is a weighty public interest that

overcomes the individual's right of privacy once a magistrate has determined that a search warrant can issue. Indeed, the court determined that officers are at greater risk when they announce, particularly in drug cases. *Id.* at 850-52, 549 N.W.2d at 223-24 (J.A. 85-87). The court quoted a *New York Times* article stating:

> It is drug dealers, rather than drug users, who use guns, Professor Decker said, because they are usually carrying valuable quantities of drugs and large amounts of money and need the protection of a gun more than ordinary users.

Fox Butterfield, "Study Discounts the Role of Drug Users in Gun-Related Crime," The New York Times, Oct. 8, 1995, at 36. *Richards, supra,* at 853, 549 N.W.2d at 224 (J.A. 89). The court also quoted from crime statistics of officer-involved shootings. *Id.* at 854-44, 549 N.W.2d at 224-25 (J.A. 90-93).

The court also held that the nature of drug cases makes its "blanket rule" amenable to apply to the destruction of evidence exception to the knock-and-announce requirement, *id.* at 856-57, 549 N.W.2d at 225 (J.A. 92-93):

> All of this points to the need for officers to control the scene immediately, not only for their own safety and the safety of others, but also to seize evidence of felonious drug delivery. After all, a search warrant commands officers to go to a particular place to seize evidence of drugs and drug paraphernalia. In *Stevens*, we recognized that the "easily disposable nature of narcotics provides police with evidence sufficient to form a reasonable belief that no-knock entry is necessary to prevent the destruction of evidence."

> *Stevens*, 181 Wis. 2d at 425. If officers must knock-and-announce their authority and presence, they provide the occupants of the house with the opportunity not only to arm themselves, but to dispose of evidence involving drugs.
>
> Allowing police to take command of the situation is thus vital to the safe and effective execution of a search warrant for evidence of felonious drug delivery. Moreover, the officers executing a search warrant are in the best position to decide how to take command of the situation. In some cases, police officers undoubtedly decide that their safety, the safety of others, and the effective execution of the warrant dictate that they knock and announce; in other cases, they might decide that such a procedure would be counterproductive or even dangerous.

The court held that the issuance of a search warrant substantially dilutes the privacy interest in the home. " '[W]here the police have a warrant to search the property, the residents retain only a very limited interest in privacy.' *Stevens*, 181 Wis. 2d at 432." *Richards, supra*, at 858, 549 N.W.2d at 226 (J.A. 95).

Finally, *id.* at 860, 549 N.W.2d at 227 (J.A. 96-97):

> When the risks of law enforcement change radically, the rules by which courts regulate the police should reflect those changes. Therefore, we conclude that exigent circumstances are always present in the execution of search warrants involving felonious drug delivery. The public interests in these circumstances greatly outweigh the minimal privacy interest of the occupants of the dwelling for which a search

warrant has already been issued. Accordingly, we re-affirm *Stevens* and conclude that police are not required to adhere to the rule of announcement when executing a search warrant involving felonious drug delivery.

Thus, petitioner's conviction was affirmed.

SUMMARY OF THE ARGUMENT

I. "Physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed." Therefore, the Fourth Amendment imposes the highest scrutiny.

Drug raids are significant events. Officers break down the door with battering rams, and they sometimes even throw in stun grenades. A multitude of police swarm in wearing bulletproof vests, their weapons drawn and pointed.

The Wisconsin Supreme Court's view is based on a *de minimis* view of this invasion of privacy, and this is fundamentally and constitutionally wrong. The privacy interests in the knock-and-announce rule are much more than slightly advanced by announcement, contrary to the Wisconsin court's view.

II. *Wilson v. Arkansas*, 115 S.Ct. 1914 (1995), held that the common law rule of announcement is a part of the Fourth Amendment. The "underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *Id.* at 1916.

The Wisconsin Supreme Court's reasoning is based on false assumptions of fact. Drug dealers are not better

armed and trained for assault than officers. The lower court relied on meaningless statistics regarding officer deaths. In fact, in the past 14 years, only 23 officers died in drug raids, none of whom died in Wisconsin. As many citizens died from gunfire in the course of such raids. Innocent persons suffer mistaken raids constantly, and sometimes they die. There are no real remedies for such police mistakes.

ARGUMENT

I. "IT IS AXIOMATIC THAT 'PHYSICAL ENTRY INTO THE HOME IS THE CHIEF EVIL AGAINST WHICH THE WORDING OF THE FOURTH AMENDMENT IS DIRECTED.' " ACCORDINGLY, HIGHER STANDARDS MUST APPLY.

A. There is a higher standard of privacy in the home.

The resolution of the question in this case starts from the premise that this case involves a dwelling, and dwellings are entitled to the highest scrutiny under the Fourth Amendment, which provides that "[t]he right of the people to be secure in their . . . houses . . . shall not be violated." "[T]he sanctity of private dwellings [is] ordinarily afforded the most stringent Fourth Amendment protection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976).

The maxim that "every man's home is his castle" is part of the common law and the Fourth Amendment. "From earliest days, the common law drastically limited the authority of law officers to break the door of a house to effect an arrest." *Miller v. United States*, 357 U.S. 301,

306-07 (1957). *See Wilson v. Arkansas*, 115 S.Ct. 1914, 1916-17 (1995). The "right to maintain control over [one's] home, and to be free from governmental interference, is a private interest of historic and continuing importance." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53-54 (1993) (bracketed material added).

Also, the Fourth Amendment protects more than just privacy. As Justice Story stated in his commentaries, the Fourth Amendment was designed to protect "personal security, personal liberty and private property." *J. Story, Commentaries On The Constitution Of The United States*, § 1902 (2d ed.1851). *See Soldal v. Cook County*, 506 U.S. 56, 62 (1992) (the Fourth Amendment "protects property as well as privacy").

It matters not that the place searched here was merely a motel room; the Fourth Amendment protects Room 138 at the Ramada Inn in Madison as much as it protects a fashionable home in Georgetown or Beverly Hills, or on Park Avenue in New York City. *United States v. Johnson*, 333 U.S. 10 (1948); *United States v. Jeffers*, 342 U.S. 48 (1951); *Stoner v. California*, 376 U.S. 483 (1964). If it has walls and people can stay there,[11] it is protected by the Fourth Amendment.

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[11] Even a tent has Fourth Amendment protection. *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir.1994); *Alward v. State*, 112 Nev. 141, 912 P.2d 243 (1996). And let us not forget the often quoted statement of William Pitt: "Every man's house is his castle. The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter – all his force dares not cross the threshold of the ruined tenement!" *See, e.g., Miller v. United States*, 357 U.S. at 307 n.7.

As *Payton v. New York*, 445 U.S. 573, 589 (1980) instructs:

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home – a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant. (bracketed material added)

Thus, the Court has repeatedly held that "It is axiomatic that 'physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed.' " *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984) (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)); *Payton v. New York, supra*, at 584-85; *Michigan v. Summers*, 452 U.S. 692, 700 n. 13 (1981); *New York v. Harris*, 495 U.S. 14, 18 (1990); *Maryland v. Buie*, 494 U.S. 325, 341 (1990).

B. A drug raid is a significant constitutional event.

A drug raid is no small invasion of privacy. Oftentimes, a horde of officers enter with guns drawn, sometimes even lobbing stun grenades in first, shouting at the occupants and usually threatening shooting or death as the penalty for non-compliance. *See, e.g., Jenkins v. Wood*, 81 F.3d 988 (10th Cir. 1996). Everyone's adrenaline is pumping. People get killed, citizens and police, both accidentally and on purpose. The invasion of a home by force like this is substantial; indeed, police argue that they must quickly and decisively secure the premises by an "unannounced dynamic entry" to protect themselves. They strive to catch the occupants off-guard and secure the premises before the occupants figure out what is happening. The state argued this below, and the Wisconsin court accepted it, referring to events occurring many years earlier and using a second-year law student's note as the impetus to justify dispensing with the common law. *Richards*, 201 Wis. 2d at 850, 549 N.W.2d at 223 (J.A. 85-86) (Note, Donald B. Allegro, *Police Tactics, Drug Trafficking, and Gang Violence: Why the No-Knock Warrant Is An Idea Whose Time Has Come*, 64 Notre Dame L.Rev. 552 (1989)); *see also State v. Stevens, supra*, at 420, 428-29, 511 N.W.2d at 593, 597.

The officers strive for control, and it works, both at the time of the search and long after. Consider the comments of Judge Fernandez of the Ninth Circuit:

> The fear of a smashing in of doors by government agents is based upon much more than a concern that our privacy will be disturbed. It is based upon concern for our safety and the safety of our families. Indeed, the minions of

> dictators do not kick in doors for the mere purpose of satisfying some voyeuristic desire to peer around and then go about their business. Something much more malevolent and dangerous is afoot when they take those actions. It is that which strikes terror into the hearts of their victims. The fourth amendment protects us from that fear as much as it protects our privacy. . . .

United States v. Becker, 24 F.3d 1537, 1540 (9th Cir.1994) (quoting *United States v. Lockett*, 919 F.2d 585, 592 (9th Cir.1990) (Fernandez, J., concurring)).[12]

This Court has already recognized that the nature of the invasion in a drug raid is substantial and of no small consequence. *Miller v. United States, supra*, at 307-08; *Ker v. California*, 374 U.S. 23, 49-53 (1963) (Brennan, J., concurring in part and dissenting in part); *Wilson v. Arkansas, supra*, at 1916-17.

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[12] The concern that the Framers had with warrants embraced a concern with houses, which encapsulated still deeper concerns. Many commentators on the proposed Constitution were deeply fearful of the manner in which the Constitution would permit federal power to invade their hearths. Open your front door, it was reasoned, and the extent of federal invasion will be infinite. The "daring brutality of the intruders will extend to the wife of thy bosom . . . the most delicate parts of our families . . . the most discrete recesses . . . private papers . . . private concerns." William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning, 602-1791* (1990) (unpublished PhD dissertation, Claremont Graduate School) at 1546-47.

C. The Wisconsin view is premised on a *de minimis*, and, therefore, erroneous, view of privacy interests in the home after a warrant issues. Even a drug raid suspect retains rights during a search.

The Wisconsin court considered the householder's interest to be substantially devalued once a search warrant issues. "Richards' privacy interests are only slightly advanced by a knock and announce rule." *Richards, supra,* at 857, 549 N.W.2d at 226 (J.A. 94). And, " 'where the police have a warrant to search the property, the residents retain only a very limited interest in privacy.' " *Id.* at 858, 549 N.W.2d at 226 (J.A. 95) (quoting *Stevens, supra,* 181 Wis. 2d at 432, 511 N.W.2d at 591). This evinces an attitude that one's rights in property after a search warrant issues are *de minimis* at best. This is fundamentally and constitutionally wrong.

The right to knock-and-announce is not a right easily cast aside by stating that "privacy interests are only slightly advanced by a knock and announce rule." Knock-and-announce is a valuable and important right that is supposed to protect both the lives of the participants to the search and privacy and property rights of the householder. After all, a person's home is his castle. *Wilson v. Arkansas, supra,* at 1916; *Maryland v. Buie, supra,* at 329; *Payton v. New York, supra,* at 596; *Ker v. California, supra,* at 47; *Miller v. United States, supra,* at 307.

In *Wilson v. Arkansas* this court held that the common law of knock-and-announce was a part of the Fourth Amendment and stated:

> Our own cases have acknowledged that the common law principle of announcement is "embedded in Anglo-American law," *Miller v. United States*, 357 U.S. 301, 313, 78 S.Ct. 1190, 1198, 2 L.Ed.2d 1332 (1958), but we have never squarely held that this principle is an element of the reasonableness inquiry under the Fourth Amendment. We now so hold. Given the long-standing common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment.

Wilson v. Arkansas, supra, at 1918. *Wilson* creates a presumption in favor of announcement, but *Richards* creates a presumption against it. *Wilson* must prevail.

The proper explanation of the constitutional event known as execution of a search or arrest warrant is much more limited than the Wisconsin court recognizes. As stated in *Maryland v. Buie*, 494 U.S. 325, 330 (1990):

> "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Payton v. New York*, 445 U.S. 573, 602-603 (1980).

A citizen "open[s] his doors to the officers" and does not surrender all privacy to them. Once lawfully on the premises, the officers are entitled to conduct a search

incident to arrest of the area in the house for officer protection and prevention of destruction of evidence; *e.g., Chimel v. California,* 395 U.S. 752, 755-60 (1969); or a protective sweep to protect against attack from other possible confederates. *Maryland v. Buie, supra.* There is no *carte blanche* to search the whole house, everywhere and anywhere the officers want to go. *Arizona v. Hicks,* 480 U.S. 421 (1978) (moving a stereo to record serial numbers during an emergency entry was impermissible).

II. THE KNOCK-AND-ANNOUNCE RULE AND THE VALUES IT INCORPORATES.

A. The knock-and-announce rule in the Supreme Court.

In 1995, this Court held in *Wilson v. Arkansas, supra,* that the seven century-old common law rule of knock-and-announce was a part of the Fourth Amendment. The Court explained where the presumption in favor of announcement would yield, *id.* at 1918-19:

> Thus, because the common-law rule was justified in part by the belief that announcement generally would avoid "the destruction or breaking of any house . . . by which great damage and inconvenience might ensue," *Semayne's Case,* [5 Co. Rep. 91a,] 91b, 77 Eng. Rep. [194,] 196 [(K.B. 1603)], courts acknowledged that the presumption in favor of announcement would yield under circumstances presenting a threat of physical violence. *See, e.g., Read v. Case,* 4 Conn. 166, 170 (1822) (plaintiff who "had resolved . . . to resist even to the shedding of blood . . . was not within the reason and spirit of

the rule requiring notice"); *Mahomed v. The Queen*, 4 Moore 239, 247, 13 Eng. Rep. 293, 296 (P.C.1843) ("While he was firing pistols at them, were they to knock at the door, and to ask him to be pleased to open it for them? The law in its wisdom only requires this ceremony to be observed when it possibly may be attended with some advantage, and may render the breaking open of the outer door unnecessary"). Similarly, courts held that an officer may dispense with announcement in cases where a prisoner escapes from him and retreats to his dwelling. *See, e.g., ibid.; Allen v. Martin*, 10 Wend. 300, 304 (N.Y.Sup.Ct.1833). Proof of "demand and refusal" was deemed unnecessary in such cases because it would be a "senseless ceremony" to require an officer in pursuit of a recently escaped arrestee to make an announcement prior to breaking the door to retake him. *Id.*, at 304. Finally, courts have indicated that unannounced entry may be justified where police officers have reason to believe that evidence would likely be destroyed if advance notice were given. *See Ker*, 374 U.S., at 40-41, 83 S.Ct., at 1633-1634 (plurality opinion); *People v. Maddox*, 46 Cal. 2d 301, 305-306, 294 P.2d 6, 9 (1956).

We need not attempt a comprehensive catalog of the relevant countervailing factors here. For now, we leave to the lower courts the task of determining the circumstances under which an unannounced entry is reasonable under the Fourth Amendment. We simply hold that although a search or seizure of a dwelling might be constitutionally defective if police officers enter without prior announcement, law enforcement interests may also establish the reasonableness of an unannounced entry.

The " 'underlying command of the Fourth Amendment is always that searches and seizures be reasonable.' " *Wilson v. Arkansas, supra,* at 1916 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

Wilson was hardly the first case to express the importance of announcement. In *Miller v. United States,* 357 U.S. 301, 313-14 (1957), the Court stated the importance of the values protected by the knock-and-announce requirement:

> We are duly mindful of the reliance that society must place for achieving law and order upon the enforcing agencies of the criminal law. But insistence on observance by law officers of traditional fair procedural requirements is, from the long point of view, best calculated to contribute to that end. However much in a particular case insistence upon such rules may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of shortcut methods in law enforcement impairs its enduring effectiveness. The requirement of prior notice of authority and purpose before forcing entry into a home is deeply rooted in our heritage and should not be given grudging application. Congress, codifying a tradition embedded in Anglo-American law, has declared in 18 U.S.C. § 3109 the reverence of the law for the individual's right of privacy in his house. Every householder, the good and the bad, the guilty and the innocent, is entitled to the protection designed to secure the common interest against unlawful invasion of the house. The petitioner could not be lawfully arrested in his home by officers breaking in without first

giving him notice of their authority and purpose. Because the petitioner did not receive that notice before the officers broke the door to invade his home, the arrest was unlawful, and the evidence seized should have been suppressed.

B. Wisconsin's blanket rule.

Wisconsin's blanket rule is based on its belief that officers should be able to excuse announcement in their own discretion on two grounds: first, as a matter of officer safety because suspects are often armed and a lot of police officers get shot in "drug related matters" and, secondly, as a matter of evidence preservation because drugs are easily disposed of. *Richards, supra,* at 856-58, 549 N.W.2d at 225-26 (J.A. 92-95) (quoted *supra* in the Statement of the Case).

C. The Wisconsin court's reasoning is based on false assumptions of fact.

1. Drug dealers do not have "ballistically superior weapons"

The majority opinion in *Richards,* 201 Wis. 2d at 855-56, 549 N.W.2d at 225-26 (J.A. 91-92), justifies its conclusion in part on the rationale that police officers are outgunned by drug dealers with "ballistically superior weapon[s]," citing R.J. Adams & T.M. McTernan, *Street Survival: Tactics for Armed Encounters* 35 (1980), a work seventeen years old and cited in Note, Allegro, 64 Notre Dame L.Rev. at 555.

Whatever the authors are referring to is not true today. Virtually every police department in America has been arming all its officers with 9mm, 10mm, and .40 caliber semi-automatic weapons with 15 round clips. In addition, drug raids are often conducted with SWAT team assistance with military-style assault-type weaponry, including submachine guns and automatic weapons and stun grenades, battering rams, and Kevlar helmets and bulletproof vests. *See, e.g., Sledd v. Lindsay*, 102 F.3d 282, 286 (7th Cir. 1996); *Jenkins v. Wood, supra; People v. Brown*, 1996 WL 743502 (N.Y.App.Div., Dec. 31, 1996) (Mazzerelli, J., dissenting). Last, but not least, law enforcement officers conducting drug raids are highly trained in securing the premises and neutralizing the occupants without violence. The persons inside do not have the same weaponry and training.

2. The State's statistics on officer deaths in drug cases do not translate to deaths in drug raids.

The U.S. Department of Justice keeps voluminous records of the numbers of police officers killed in the United States. The report, U.S. Department of Justice, *Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted*, is annually published (hereafter, UCR (year)). The court below discussed shooting generally, relying on the reports of 1977-86 from a law review article referring to officers dying in "drug related matters." *Richards*, 201 Wis. 2d at 853-55 nn. 8-10, 549 N.W.2d at 223-25 nn. 8-10 (J.A. 88-92).

This contention is fallacious. The number of officers killed in drug raids is not readily apparent. The tables in the UCRs show the number of officers killed each year in "drug related matters," but are overinclusive. The summaries in the UCRs must be consulted for an accurate view.

Our analysis of the 1981-94 reports shows that the overwhelming majorities of felonious deaths of peace officers were unrelated to the execution of search warrants for drugs.[13] There is no significant statistical correlation between announcement or lack of announcement and the resulting deaths. Only 8 of 23 summaries even mention whether announcement occurred. The circumstances of some killings show that the officer was shot on entry, but the greatest threat to officers was from being shot by assailants hidden inside and not from being shot on entry. The summaries are in Appendix B. At least one of the raids (Stockton, California, 1993), involved a tip there were drugs on the premises, but there were none. The police killed the occupant after he shot the officer. This shooting is discussed in James Bovard, *Lost Rights* 236, at nn. 304-05 (1994). The summaries do not mention how many officers were shot serving warrants where no drugs were found.

For what it is worth, the UCRs show that no Wisconsin officer died executing a search warrant for drugs in

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[13] Officers seem to be at least as likely to be shot arranging a drug buy where no search is involved.

that period. However, newspaper reports show that one unarmed citizen was shot by Wisconsin officers just since *Stevens*. *See* "They Shot Daddy," *infra*.

3. Citizen deaths during drug raids.

The U.S. Department of Justice does not keep records of the number of citizens that die during drug raids. Other sources[14] show that at least as many innocent citizens as police officers die during drug raids, not even mentioning drug dealers who die. Even when police officers enter announcing their purpose, there often will be questions of whether the people inside could hear the self-servingly claimed shouts of "Police; search warrant!"[15]

In Beaver Dam, Wisconsin on April 17, 1995, Scott Bryant, an unarmed accused marijuana dealer, was shot to death inside his home in the presence of his 7 year-old

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[14] Tragedy was barely averted in *State v. Coleman*, 199 Wis. 2d 174, 176-78, 544 N.W.2d 912, 913-14 (Ct. App. 1996), *aff'd*, 206 Wis. 2d 198, 556 N.W.2d 701 (1996), where Milwaukee officers executing a no-knock warrant yelled, "Police, search warrant!" as soon as they entered. They faced a householder with a gun who thought he was being robbed. The court held that a narrow defense of privilege existed to the charge of being a felon in possession of a firearm. The Wisconsin Supreme Court mentioned his surprise that the people breaking his door down were police officers, and, as soon as he realized they were the police, he dropped his gun and raised his hands. *Coleman*, 206 Wis. 2d at 203, 556 N.W.2d at 703.

[15] *See State v. Coleman, supra*. In addition, home invasion robberies sometime involve robbers impersonating police officers.

son. The officer shot him immediately on entry during a drug raid. The prosecutor relied on *Stevens* in determining that charges would not be filed against the officer. Chip Mitchell, "They Shot Daddy," Isthmus (Madison, WI) 1, 8-9 (June 30, 1995).

As important as it is that police officers not die executing drug warrants, is it not just as important that citizens not die, either? Selling or possessing marijuana is not a crime of violence justifying deadly physical force. *See Tennessee v. Garner*, 471 U.S. 1 (1985). Yet, Wisconsin's rule invites death. Scott Bryant, a non-violent citizen cloaked with the presumption of innocence, was needlessly slaughtered in Wisconsin as a result of its blanket rule. How many more must die before the folly of the blanket exception is finally recognized?

4. Raiding the homes of innocent citizens.

It appears that the police often raid the wrong house either because they have bad information or because they are negligent.

Dozens of examples of erroneous no-knock drug raids were given and newspaper articles were reprinted in the Congressional Record when the federal no-knock law was repealed in 1974. 120 Cong.Rec. 22882-906 (July 11, 1974). Several more recent examples appear in James Bovard, *Lost Rights* 234-39 (1994), and James Bovard, "Oops, You're Dead: The Body Count from No-Knock Drug Raids is Climbing, Are You Next?", Playboy 50-51 (Dec.1994). For an earlier article, *see* Andrew H. Malcolm,

"Violent Drug Raids Against the Innocent Found Widespread," The New York Times (June 25, 1973) A1. *See also* CBS News, *60 Minutes*, Vol. XXV, No. 27 at 6-7 (Mar. 28, 1993). [Fortune 500 company executive, who had been sleeping, shot three times when police, without announcement, raided his home for drugs. None were found.] In a 1993 newspaper article, a DEA supervising agent admitted that the wrong places are raided continually:

> With alarming frequency, police in their quest for drugs are raiding the homes of innocent people.
>
> "It happens every day in this business," said Capt. Art Binder of the Cumberland County (N.C.) Sheriff's Department, whose own officers recently raided two wrong houses before hitting, on their third try, the right one.
>
> Last year alone, police killed at least three innocent people during errant drug searches, wounded another and traumatized countless more.
>
> The survivors of these raids report months of counseling, trouble with their children,[16] and nightmares so intense that some have moved just to get away from the memories . . .
>
> After the New Mexico raid, Tom Smith, the assistant special agent in charge of the DEA's Albuquerque office, said it was not unusual to come up empty handed.
>
> "It happens all the time," he said.

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16 It does not instill respect for law enforcement in children when law enforcement practices terrorize them.

Joe Hallinan, "Drug Wars: Fervor Often Injures the Innocent," New Orleans (LA) Times-Picayune (Sept. 26, 1993) A20 (footnote added). The numbers of erroneous raids even reported in the press may only be the tip of the iceberg because not every aggrieved citizen dares complain.

When the federal no-knock law was being repealed, many senators eloquently pronounced this law unconstitutional under the Fourth Amendment as inherently, unjustifiably dangerous to citizens and police officers alike. As Senator Nelson summed it up:

> Mr. President, approximately 185 years ago, Thomas Jefferson warned that "the natural progress of things is for liberty to yield and government to gain ground."
>
> Unfortunately, that warning has proved prophetic all too often. On too many occasions government needs have been given priority over individual liberties.
>
> Nowhere is this more true than in the enactment of the no-knock provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970. . . .

120 Cong. Rec. at 22888-89.[17]

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[17] Similar opposition was stated when the federal no-knock law was adopted. 116 Cong.Rec. 1159-62, 1163-77, 33639-666. The arguments remain unchanged, only the names of the participants have changed. *See, e.g.*, Sen. Sam Ervin of North Carolina criticizing this statute which "encourages the officer to emulate[] the actions of a burglar and [break] into a house without notice, concealing the fact that he has a search warrant . . . " *Id.* 1163.

5. What is the remedy for mistakes?

Are there any remedies for the citizenry of this nation from police mistakes?

Can a civil claim be made against police negligently raiding the wrong house or negligently killing the occupant? No. Negligence cannot form the basis of a 42 U.S.C. § 1983 case. *Daniels v. Williams*, 474 U.S. 327 (1986); *Polk County v. Dodson*, 454 U.S. 312, 326 (1981). The police cannot be sued for negligence under most states' laws, either. It is possible under the law of some states for a citizen to file a negligence claim,[18] but they are few and far between. Officers can easily claim they relied in good faith on their informant to avoid liability,[19] a standard this Court already requires trial courts to apply in the usually unsuccessful veracity challenges to affidavits under *Franks v. Delaware*, 438 U.S. 154, 171 (1978). This Court recognized long ago that alternative remedies are useless in enforcing the requirements of the

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[18] Rev. Accelyne Williams, a 75 year old black minister, was the subject of a groundless drug raid. After breaking down his door, the police chased him through the house to his bedroom, and handcuffed him. This provoked a heart attack which killed him. The police had obtained a no-knock warrant because their informant had told them they could expect armed resistance. His widow settled with the Boston Police Department for $1,000,000. "Boston to Give Victim's Widow $1 Million in Wrongful Death Suit," N.Y. Times Abstracts (Apr. 25, 1996) 1996 WL 7503359; "Boston Settles Death Suit," National Law Journal (May 6, 1996) A8.

[19] *See, e.g., Jenkins v. Wood, supra;* Written testimony of Donald Carlson, U.S. Congress, House Government Operations Committee, Hearing on Asset Forfeiture (June 22, 1993).

Fourth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 652-53 (1961).

Will the police officer be prosecuted for negligent homicide? It may be theoretically possible, but what prosecutor wants to charge the police in his or her jurisdiction for anything? *See, e.g.,* Mitchell, "They Shot Daddy," *supra;* Kathy Scruggs, "Officer: Police Bullet Killed Boy," Atlanta Constitution (Nov. 14, 1991).

Yet, the police will certainly prosecute a homeowner defending himself. Some are acquitted or the charges are later dismissed. *See, e.g.,* "Man Innocent of Police Murder during Drug Raid," United Press International (Aug. 17, 1989); Diego Ribadeneira, "Flynn Forms Panel to Study Police Drug Unit's Methods," Boston Globe (Apr. 14, 1989) at 1.

6. Protection against mistakes.

The knock-and-announce rule is intended to protect against mistakes. In *Ker v. California,* 374 U.S. 23, 57-58 (1963), Justice Brennan, writing for four Justices concurring and dissenting, said:

> Beyond these constitutional considerations, practical hazards of law enforcement militate strongly against any relaxation of the requirement of awareness. First, cases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information. That possibility is itself a good reason for holding a tight rein against judicial

> approval of unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion. Second, the requirement of awareness also serves to minimize the hazards of the officers' dangerous calling. We expressly recognized in *Miller v. United States, supra,* 357 U.S., at 313, n. 12, that compliance with the federal notice statute "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder." Indeed, one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers, " * * * for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." *Launock v. Brown,* 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (1819).
>
> These compelling considerations underlie the constitutional barrier against recognition of exceptions not predicated on knowledge or awareness of the officers' presence.

The Wisconsin rule has conducted balancing of individual liberty and the public need in advance, *a priori,* without regard to the potential facts, and it has left individual liberty wanting. Under the blanket exception, mistakes of the police are tolerable, no matter how grievous they may be. Deference to the police cannot be this absolute under our form of government.

III. DEFERENCE TO "SPECIAL NEEDS" OR "OPERATIONAL NECESSITIES" IN THIS AREA OF LAW IS BOOTSTRAPPING. THE ENTIRE PREMISE OF JUDICIAL REVIEW OF SEARCH AND SEIZURE QUESTIONS REQUIRES TRIAL AND APPELLATE ANALYSIS OF REASONABLENESS.

A. Neither "special needs" nor "operational necessities" support the blanket rule.

1. The holdings from this Court on "special needs."

The court below did not mention this topic, but this Court likely will, so we address it now: If the Court adopts the blanket exception to knock-and-announce in drug cases, it would also have to create a new exception to the "special needs" exception to the probable cause and warrant requirement for what amounts to a question of execution of a search warrant.

The Court first addressed the "special needs" exception in Fourth Amendment cases in *New Jersey v. T.L.O.*, 469 U.S. 340, 351 (1985) (Blackmun, J., concurring), where the Court held that neither a warrant nor probable cause was necessary to conduct a search of a student where there was reasonable suspicion to believe that the student was in possession of contraband, considering the unique status that a school has with the children attending it.

> Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

The Court has applied Justice Blackmun's language repeatedly in finding exceptions to the warrant requirement. *See, e.g., Griffin v. Wisconsin,* 483 U.S. 868, 873 (1987) (probationer searches); *Skinner v. Railway Labor Executive's Association,* 489 U.S. 602, 620 (1989) (urine testing of railroad employees involved in accidents); *Vernonia School Dist. 47J v. Acton,* 115 S.Ct. 2385, 2391 (1995) (urine testing of student athletes).

Only *Griffin* involved a dwelling, and the Court held there that an informant's tip that the probationer was in possession of a weapon was a sufficient basis to authorize a warrantless search under probation regulations requiring reasonable grounds to believe that the probationer was violating the law. *Griffin, supra,* at 875.

In two other cases, the Court has mentioned "operational necessities" as a justification for a police seizure on less than probable cause. *See Arizona v. Hicks,* 480 U.S. 321, 327 (1987):

> We do not say, of course, that a seizure can never be justified on less than probable cause. We have held that it can – where, for example, the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime. *See, e.g., United States v. Cortez,* 449 U.S. 411 (1981) (investigative detention of vehicle suspected to be transporting illegal aliens); *United States v. Brignoni-Ponce,* 422 U.S. 873 (1975) (same); *United States v. Place,* 462 U.S. 696, 709, and n. 9 (1983) (dictum) (seizure of suspected

drug dealer's luggage at airport to permit exposure to specially trained dog). No special operational necessities are relied on here, however – but rather the mere fact that the items in question came lawfully within the officer's plain view. That alone cannot supplant the requirement of probable cause.

2. How do they apply? Can they apply?

Here, the police obtained a warrant after satisfying a judge that there was probable cause for a search. So, on the one hand, probable cause has been shown. But, does that still permit them to nullify a basic constitutional protection and the requirement that all searches be reasonable without showing any specific articulable facts that they have a need to dispense with announcement? (The phrases "operational necessities" and "special needs" are seductive in this situation; but the Court should not be tempted.)

Remember that here a dwelling was involved, and only one case permitted a search of a dwelling on less than probable cause and with "special needs": *Griffin v. Wisconsin* where the probationer was already on the street by the grace of the executive branch of state government and under its complete control. These historical facts of life of probationers made the use of a lesser standard of probable cause permissible.

For the "special needs" exception to apply, there has to be some existing relationship between the person conducting the search and the person to be searched. The "special needs" exception has never been extended to a

purely criminal search. If the Court does so here, "reasonableness" will be a concept that will forever defy definition. And, if "reasonableness" can no longer be defined, then the courts will never be able to determine whether particular police conduct is lawful. And, if that happens, the "reasonableness" requirement of all searches and police activity will have been virtually read out of the law.

B. Deference to the police is a dangerous proposition when knock-and-announce is at issue.

The Wisconsin rule defers to the police the question of reasonableness in drug searches. This is a dangerous proposition that goes far beyond anything this Court has ever approved. As the Court said in 1964, "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police." *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (quoted in *United States v. Leon*, 468 U.S. 897, 915 n. 13 ((1984)) as a function belonging to a neutral and detached magistrate). What the state has done here gives the police absolute discretion to determine how a householder will give up his or her privacy to a search warrant.

C. Deference to the police and "blanket rules" are contrary to established law.

The Wisconsin blanket rule is contrary to established law and the genius of the reasonableness requirement.

This court has never sanctioned this kind of deference in Fourth Amendment cases. In *United States v. Leon*, 468 U.S. 897, 914 (1984), the Court held that even deference to magistrates is not boundless. Deference to police is inappropriate because they are " 'engaged in the often competitive enterprise of ferreting out crime,' " *id.* (quoting *United States v. Johnson*, 333 U.S. 10, 14 (1948)).

> Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable cause determination reflected an improper analysis of the totality of the circumstances.

Id. at 915. In adopting the "totality of circumstances" test for probable cause in *Illinois v. Gates*, 462 U.S. 213, 229 (1983), the Court held:

> Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a bare ratification of the bare conclusions of others. In order to ensure that such an abdication of the magistrate's duty does not occur, courts must continue to conscientiously review the sufficiency of affidavits on which warrants are issued.

See Malley v. Briggs, 475 U.S. 335 (1986) (officer may be civilly liable for executing a warrant that could not justifiably be relied on).

As to the veracity of the officer applying for a warrant, the Court has said that the officer's statement of

probable cause is open to challenge for knowing or reckless falsity, holding that "a flat ban on impeachment of veracity could denude the probable cause requirement of all meaning." *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978).

Similarly, the Court has never held that the method of conducting a search is beyond judicial review, either. In *Terry v. Ohio*, 392 U.S. 1, 15 (1968), the Court held that

> courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which entrenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials.

"[A] search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope . . . The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Id.* at 17-19. The Court sanctioned a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on "specific and articulable facts," *id.* at 21, and not on a mere "inchoate and unparticularized suspicion or 'hunch,' " *id.* at 27, "that he is dealing with an armed and dangerous individual." *Id.*

Finally, "[t]he manner in which a warrant is executed is subject to later judicial review as to its reasonableness." *Dalia v. United States*, 441 U.S. 238, 258 (1979). *See also Arizona v. Hicks, supra*, reviewing an overintensive search.

Perhaps the closest case of all is *Maryland v. Buie*, 494 U.S. 325 (1990), the protective sweep case. There, the state argued for a blanket rule, which this Court rejected. *Id.* at 334 n. 2. The *Buie* Court held that "specific and articulable facts" demonstrating a potential danger to the officer were required to be shown before officers could conduct a protective sweep. *Id.* at 334, 336, 337. *Buie* rejected essentially the same justification made here:

> The State's argument that no level of objective justification should be required because of "the danger that inheres in the in-home arrest for a violent crime," Brief for Petitioner 23, is rebutted by *Terry v. Ohio*, 392 U.S. 1 (1968), itself. The State argues that "[o]fficers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis," Brief for Petitioner 23. But despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted. That approach is applied to the protective sweep of a house.
>
> We reject the State's attempts to analogize this case to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), and *Michigan v. Summers*, 452 U.S. 692 (1981). The intrusion in *Mimms* – requiring the driver of a lawfully stopped vehicle to exit the car – was *"de minimis,"* 434 U.S., at

> 111. *Summers* held that a search warrant for a house carries with it the authority to detain its occupants until the search is completed. The State contends that this case is the "mirror image" of *Summers* and that the arrest warrant carried with it the authority to search for persons who could interfere with the arrest. In that case, however, the search warrant implied a judicial determination that police had probable cause to believe that someone in the home was committing a crime. Here, the existence of the arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee's house. Moreover, the intrusion in *Summers* was less severe and much less susceptible to exploitation than a protective sweep. A more analogous case is *Ybarra v. Illinois*, 444 U.S. 85 (1979), in which we held that, although armed with a warrant to search a bar and bartender, the police could not frisk the bar's patrons absent individualized, reasonable suspicion that the person to be frisked was armed and presently dangerous. Here, too, the reasonable suspicion standard – "one of the relatively simple concepts embodied in the Fourth Amendment," *United States v. Sokolow*, 490 U.S. 1 (1989) – strikes the proper balance between officer safety and citizen privacy.

The leading case[20] on the so-called blanket rule in knock-and-announce is *People v. Gastelo*, 67 Cal. 2d 586, 588-89, 63 Cal. Rptr. 10, 12, 432 P.2d 706, 708 (1967), where Justice Traynor held that the particularity clause was also violated by a blanket rule:

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[20] 2 Wayne R. LaFave, *Search and Seizure* § 4.8(d), at 611 (3rd ed. 1996).

> Under the Fourth Amendment, a specific showing must always be made to justify any kind of police action tending to disturb the security of the people in their homes. Unannounced forcible entry is in itself a serious disturbance of that security and cannot be justified on a blanket basis. Otherwise the constitutional test of reasonableness would turn only on practical expediency, and the amendment's primary safeguard – the requirement of particularity – would be lost. Just as the police must have sufficiently particular reason to enter at all, so must they have some particular reason to enter in the manner chosen.

(Illinois recently rejected a blanket rule under *Wilson* and applicable state law. *People v. Krueger*, 1996 WL 732035, 65 U.S.L.W. 2443 (Ill. Dec. 19, 1996)).

Wisconsin initially rejected the blanket rule in *State v. Cleveland*, 118 Wis. 2d 615, 631 n. 16, 348 N.W.2d 512, 521 n. 16 (1984). The court said

> The officer must have knowledge of specific facts which indicate that this particular person will conduct himself or herself in this manner when confronted by police. In this case, however, there was no information that the defendant was armed or had taken other security precautions.

Neither the *Richards* nor *Stevens* decisions explained the legal principles upon which the blanket rule can comport with the Fourth Amendment. Indeed, in *Richards, supra*, at 849 n. 6, 549 N.W.2d at 521 n. 6, (J.A. 85) the court states that its "holding is based on the assumption that drug dealers will have weapons and pose a danger to officers . . . " The *Richards* court also stated that "[p]olice

officers face an unquantifiable risk of violence every time they go into a house to execute a search warrant." *Id.* at 850, 549 N.W.2d at 223 (J.A. 86). Therefore, the Wisconsin Supreme Court has abandoned the knock-and-announce rule based on "assumption[s]" that are in turn based on risks that are "unquantifiable."

D. The Wisconsin rule subverts judicial review of reasonableness.

It is the function of trial and appellate courts to determine reasonableness in every case, and no case has dispensed with it as this blanket rule does. *Leon* and *Gates* show that deference to the magistrate is not boundless; rather, judicial review enables the courts to determine whether probable cause existed for the search. It is the fundamental function of the courts to review executive action under the separation of powers principle. Accordingly, reasonableness is always subject to review. *Wilson v. Arkansas, supra,* at 1919; *Ornelas v. United States,* 116 S.Ct. 1657, 1662 (1996).

If this Court adopts Wisconsin's position on the blanket rule, *Wilson* and *Buie* become meaningless abstractions.

E. The standard should be reasonable suspicion under *Buie* and "totality of the circumstances" on review

The rules of *Buie* and *Gates* should apply: Officers must be able to point to specific and articulable facts which justify their entering without announcement under

any of the recognized exceptions to knock-and-announce. The court can look to the "totality of the circumstances" to see whether the police action was justified.

CONCLUSION

The judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Wis. Stats. § 968.10 (1989-90):

Searches and seizures; when authorized

A search of a person, object or place may be made and things may be seized when the search is made:

(1) Incident to a lawful arrest;

(2) With consent;

(3) Pursuant to a valid search warrant;

(4) With the authority and within the scope of a right of lawful inspection;

(5) Pursuant to a search during an authorized temporary questioning as provided in s. 968.25; or

(6) As otherwise authorized by law.

Wis. Stats. § 968.12 (1989-90):

Search warrant

(1) Description and issuance. A search warrant is an order signed by a judge directing a law enforcement officer to conduct a search of a designated person, a designated object or a designated place for the purpose of seizing designated property or kinds of property. A judge shall issue a search warrant if probable cause is shown.

(2) Warrant upon affidavit. A search warrant may be based upon sworn complaint or affidavit, or testimony recorded by a phonographic reporter or under sub. (3)(d), showing

probable cause therefor. The complaint, affidavit or testimony may be upon information and belief.

(3) Warrant upon oral testimony.

. . .

(c) Issuance. If the judge determines that there is probable cause for the warrant, the judge shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge's name on the duplicate original warrant. In addition, the person shall sign his or her own name on the duplicate original warrant. The judge shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was ordered to be issued. The finding of probable cause for a warrant upon oral testimony shall be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

. . .

(e) Contents. The contents of a warrant upon oral testimony shall be the same as the contents of a warrant upon affidavit.

(f) Entry of time of execution. The person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

(4) Location of search. A search warrant may authorize a search to be conducted anywhere in the state and may be executed pursuant to its terms anywhere in the state.

Wis. Stats. § 968.13 (1989-90):

Search warrant; property subject to seizure

(1) A search warrant may authorize the seizure of the following:

(a) Contraband, which includes without limitation because of enumeration lottery tickets, gambling machines or other gambling devices, lewd, obscene or indecent written matter, pictures, sound recordings or motion picture films, forged money or written instruments and the tools, dies, machines or materials for making them, and controlled substances, as defined in s. 961.01(4), and controlled substance analogs, as defined in s. 961.01(4m), and the implements for smoking or injecting them. Gambling machines or other gambling devices possessed by a shipbuilding business that complies with s. 945.095 are not subject to this section.

(b) Anything which is the fruit of or has been used in the commission of any crime.

(c) Anything other than documents which may constitute evidence of any crime.

(d) Documents which may constitute evidence of any crime, if probable cause is shown that the documents are under the control of a person who is reasonably suspected to be concerned in the commission of that crime under s. 939.05(2).

(2) In this section, "documents" includes, but is not limited to, books, papers, records, recordings, tapes, photographs, films or computer or electronic data.

Wis. Stats. § 968.22 (1989-90):

Effect of technical irregularities

No evidence seized under a search warrant shall be suppressed because of technical irregularities not affecting the substantial rights of the defendant.

APPENDIX B

U.S. Department of Justice, Uniform Crime Reports: Law Enforcement Officers Killed and Assaulted (UCR (year)), analysis of annual summaries of officer killings in drug raids:

In 1994, one officer died during a drug raid at a Los Angeles Hotel. The officers knocked and announced, and an assailant hiding under the bed shot the officer in the course of the search. The SWAT team killed the assailant. UCR (1994) 45.

In 1993, two officers died in drug raids and one died in a "buy-bust" situation. The drug raid killings were in Stockton, California and Shreveport, Louisiana. In both descriptions, the element of surprise had nothing to do with the killing; the officers were killed well after announcement by persons coming from inside rooms away from the room where entry occurred. UCR (1993) at 41, 47. The "buy-bust" was in New York City, and the summary says nothing about when or where the shooting occurred in relation to a drug raid. *Id.* 49.

In 1992, three officers died in drug raids. In Palmdale, CA. an officer was killed inside the house after announcement. In El Paso County, Colorado, the officer was shot on entry. An officer in Shreveport was killed in a drug raid where he was shot by a person hidden in a bedroom. UCR (1992) 42, 47.

In 1991, no officer died during a drug raid. UCR (1991).

In 1990, two officers were killed. In West Sacramento, California an officer was shot pursuing a drug suspect to

a bedroom after entry. An FBI agent was killed in St. Louis, Missouri after opening a bedroom door inside; the officer and his assailant shot simultaneously. UCR (1990) 23 & 30.

In 1989, there were two deaths. In San Joaquin County, California, the slain officer, standing at the back window trying to divert the attention of the occupants, was shot from inside. A Titusville, Florida officer was shot entering a bedroom after the initial entry. UCR (1989) 26, 27

In 1988, there were three deaths during drug raids. An officer in Los Angeles County, California was killed, apparently on entry. An officer in Wichita, Kansas, was killed after entry by a suspect hidden in kitchen. A Boston, Massachusetts officer was killed by a suspect shooting through the door after forcible entry was attempted and failed (whether announcement occurred is not mentioned). UCR (1988) 24, 29, 31.

In 1987, one officer died during a drug raid in Ft. Pierce, Florida. He was killed after entry when he fired at a suspect first and his gun jammed; the suspect returned fire. UCR (1987) 25.

In 1986, there were no officer deaths during drug raids. UCR (1986).

In 1985, there was one officer death during a drug raid in Westville, New Jersey: an officer was shot dead by a person hidden inside after police handcuffed the first arrestee. UCR (1985) 33.

In 1984, one officer was killed in a drug raid. The attempted forcible entry in Longview, Texas failed

because the door was held by a chain. The assailant shot through the opening. UCR (1984) 24.

In 1983, five officers perished in drug raids. An officer in Townsend, Georgia, was stabbed in the back. A Pine Lawn, Missouri officer announced his presence, entered, and was shot. An Alameda, California officer was shot by a suspect who was leaving through a window trying to escape. A Los Angeles, California, officer was shot while entering through a window. In Pittsburgh, Pennsylvania, an officer was shot during a raid where the first officer entered by ruse and lost her gun to the occupants. When the others tried to enter to get her, one got shot. UCR (1983) 23, 24, 26, 27, 32.

In 1982, one officer was killed during a drug raid in San Joaquin County, California. There was announcement and refusal, but the forced entry failed. The assailant opened the door and shot him. UCR (1982) 26.

In 1981, one officer was killed during a drug raid in Tampa, Florida. After announcement and entry, there was gunfire from the bedroom. UCR (1981) 28.

The UCR (1995) will be published shortly.